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In the Supreme Court of the United States

OCTOBER TERM, 1979

ROGER D. MONROE, PETITIONER

v.

THE STANDARD OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, are violated when a reservist is denied an employment benefit solely because attendance at a military training exercise necessitates his absence from work on a particular day.

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The Solicitor General, on behalf of Roger D. Monroe,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–13a) is reported at 613 F.2d 641. The opinion of the district court (App. D, *infra*, 17a–26a) is reported at 446 F. Supp. 616.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 14a–15a) was entered on January 24, 1980. A petition for rehearing was denied on April 15, 1980 (App. C, *infra*, 16a). On July 8, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 28, 1980 (App. E, *infra*, 27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

38 U.S.C. 2021(b)(3) provides in pertinent part:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

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[1] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

STATEMENT

1. Petitioner is a full-time employee at respondent's Lima, Ohio refinery. The refinery operates 24 hours per day, seven days per week, and the work day is divided into three eight-hour shifts. Respondent schedules each employee to work five eight-hour days per week, generally in succession, but with a different five-day period each week (App. D, *infra*, 18a). The collective bargaining agreement in force at the refinery permits employees to exchange scheduled work hours with other employees, provided that no overtime obligation is incurred by respondent as a result of the change (App. A, *infra*, 3a).

During the period involved in this action, petitioner was a member of the United States Army Reserve, and his military obligations required him periodically to attend training sessions with his unit, ordinarily on weekends (App. A, *infra*, 2a). See 10 U.S.C. 270(a)(1). Respondent took no cognizance of petitioner's reserve obligations in scheduling shifts and therefore often scheduled him to work as part of his five-day week on days on which he was obligated to attend reserve training sessions. In 1975 and 1976, respondent scheduled petitioner to work on 28 days on which he had military obligations. On four of those days petitioner was able to exchange shifts with other employees. On the other 24 days he was unable to arrange any exchange, and therefore he worked and was paid for fewer than 40 hours in the corresponding week. As a result, petitioner lost a total of 192 hours of work and salary in this two-year period (App. A, *infra*, 3a).

2. Petitioner brought this action in the United States District Court for the Northern District of Ohio claiming that respondent's failure to attempt to schedule his work days to avoid a conflict with his military obligations violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* Specifically, he claimed that respondent had violated 38 U.S.C. 2021(b)(3), which provides that no employee shall be denied "any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."[2] Petitioner contended that respondent, in making no attempt to schedule his work to avoid a conflict with his military obligations, denied him the right to work a 40-hour week, an "incident or advantage of employment" within the meaning of the Act, because of his Reserve obligations.

The district court granted petitioner's motion for summary judgment based upon a stipulated set of facts (App. D, *infra*, 17a-26a). The court found that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" (*id.* at 24a). Accordingly, the court held that the Act required respondent to make an accommodation in its scheduling to account for petitioner's military obligations. In so holding, the court explicitly rejected respondent's contention that the Act required only that an employer treat all of its employees in a neutral fashion. Rather, because of the importance of a

[2]This provision was added to the veterans' reemployment rights provisions in 1968 as 50 U.S.C. App. (1970 ed.) 459(c)(3) and was recodified in 1974 as 38 U.S.C. 2021(b)(3).

properly trained military force to the security of the nation, the statute requires "positive action" on the employer's part to avoid the denial of advantages of employment to reservists (*id.* at 24a-25a). The court entered judgment for petitioner for $1,086.72, the amount of wages lost as a result of respondent's wrongful failure to attempt to accommodate petitioner's reserve obligations during the period at issue (*id.* at 26a).

The court of appeals reversed (App. A, *infra*, 1a-13a). The court agreed with the district court's finding that the right to be scheduled for 40 hours of work per week was an "incident or advantage" of petitioner's employment (*id.* at 7a-8a). But the court of appeals held that a condition precedent to the exercise of the right to work 40 hours was petitioner's presence at work on the scheduled days (*id.* at 10a, 12a). The court recognized that petitioner could not be present on some of those days because of his reserve obligations, but it held that the Act offered no protection against the adverse consequences of these absences. Rather, the court held, the Act protects reservists only against "intentional unequal treatment" or "on-the-job bias" by their employers (*id.* at 10a, 11a). Hence, the Act is satisfied if "collective bargaining agreements and employment rules [are] facially neutral and [are] applied uniformly and equally to all employees" (*id.* at 11a). The court found that this test was met in this case because petitioner's absences were treated just as non-military absences of other employees would have been treated (*id.* at 11a-12a). The court of appeals dismissed the district court's holding that the Act requires accommodation of the reservist's schedule as a

"fashioning of exclusive preferential rights" for the reservist that is without support in the statute (*id.* at 10a, 13a.)

REASONS FOR GRANTING THE PETITION

1. As the court of appeals recognized (App. A, *infra*, 12a–13a), its decision is in direct conflict with the Fifth Circuit's decision in *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (1980). The facts in *West* are virtually indistinguishable from those in the case at bar. All employees were guaranteed a 40-hour work week, but West, a National Guardsman, was not always able to work 40 hours because his monthly weekend training obligation sometimes conflicted with his employment schedule. The Fifth Circuit held that the employer's refusal to attempt to accommodate West's military obligations in its scheduling was a violation of the Act.

The interpretation given to 38 U.S.C. 2021(b)(3) by the court below also conflicts with that adopted by two other circuits in similar cases. In *Carney* v. *Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), cert. denied, No. 79-757 (Feb. 19, 1980), the court held that the employer violated the Act in charging a National Guardsman with missed overtime opportunities on days that he was absent from work because of his military obligations. The Seventh Circuit cited the district court's decision in this case with approval (602 F.2d at 766 n.1), and the court below, although agreeing with the result in *Carney* on another ground, recognized that its interpretation of the statute was inconsistent with that in *Carney* (App. A, *infra*, 13a). In *Carlson* v. *New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), cert. denied, No. 79-1331 (Apr. 21, 1980), a

reservist was transferred to a less desirable assignment for reasons related to his military obligations. The First Circuit rejected the defendant's argument that the reservist was being treated just as any other employee who had non-military absences and, relying in part on the district court decision in this case, held that the requirements of the Act were not satisfied by treating military obligations the same as personal leaves of absence. 609 F.2d at 1027.

It is important that this conflict in the circuits be resolved. In addition to the four recent appellate decisions discussed above, the Department of Labor reports that 66 cases involving possible violations of 38 U.S.C. 2021(b)(3) are now pending in the federal courts or are under investigation.[3] Moreover, as of April 1980, there were approximately 830,000 ready reservists in the nation's armed forces, many of whom are employed in civilian jobs. *Official Guard and Reserve Manpower Strength and Statistics (Reserves not on Active Duty)*, prepared by the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs), Report No. 1147/1148 (May 31, 1980). It is essential that these reservists and their employers understand their respective rights and obligations under the Act.[4] As the law presently stands, the rights of a reservist will

[3] Twenty-two of these cases concern the precise issue presented here, scheduling of work hours in conflict with reserve obligations.

[4] Moreover, in light of the "increased reliance on Reserve forces for the national defense of our country," *Peel* v. *Florida Dep't of Transportation*, 443 F. Supp. 451, 459 (N.D. Fla. 1977), aff'd, 600 F.2d 1070 (5th Cir. 1979), it is important for recruitment that potential enlistees in the Reserves understand their rights under the Act.

vary depending upon whether or not he is employed—even by the same employer—in the Sixth Circuit.

2. In addition to creating a conflict in the circuits, the court of appeals' narrow interpretation of the Act is erroneous. The plain language of the statute prohibits the denial of any "incident or advantage of employment" to a reservist because of his military obligations. Because petitioner was denied the opportunity to work a 40-hour week as a result of his training commitment, the statute has been violated. Nothing in the language of the statute suggests that its scope is restricted to actual discrimination against reservists *per se*, which will occur only rarely. Indeed, the focus of the statute on a reservist's obligations, rather than simply on his status as a reservist, supports the view that the statute is aimed at a more pervasive problem—facially neutral rules that adversely affect reservists because of the schedule constraints imposed upon them by their training requirements.

The legislative history of 38 U.S.C. 2021(b)(3) lends further support to this interpretation. The statute was enacted in order to protect reservists against "[e]mployment practices which disadvantage employees with Reserve obligations." H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968). The reason for affording such protection was clearly stated in the House Committee Report issued when the bill was first introduced, which explained that "[i]f these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the

minimum extent possible." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).[5] Thus, it was clearly Congress' intent that employers be required not only to refrain from overt discrimination against reservists, but also to take positive action to minimize the economic disadvantages that their employment practices impose upon reservists, even if those practices are not adopted or applied with a discriminatory intent.

Moreover, the court of appeals' view that facially neutral rules necessarily satisfy 38 U.S.C. 2021(b)(3) is completely contrary to the basic principles of the veterans' reemployment rights provisions of the Act. Congress has acted to place military service, including service in the Reserves, in a special category. Thus, a veteran returning from military service is entitled by statute to certain benefits in his civilian employment notwithstanding the fact that employees on nonmilitary leaves of absence would not accrue those benefits. See *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 7; *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 591 (1977).

The court of appeals is therefore incorrect in characterizing petitioner's claim as one for "exclusive preferential rights" (App. A, *infra*, 10a). Petitioner seeks only to be treated the same as other employees who are not required to be absent from work in order to attend military training, and Congress has conferred the right to such treatment upon him. The "prefer-

[5] This report accompanied H.R. 11509, which contained what is now 38 U.S.C. 2021(b)(3). The bill passed the House, but not the Senate, in the 89th Congress. The provision was enacted in identical form by the 90th Congress.

ence" identified by the court of appeals is no preference at all because it results in no advantage for a reservist over his fellow employees. Both petitioner and his fellow employees have the same right—the opportunity to work a 40-hour week unless absent from work for reasons unrelated to military service. Congress has simply determined that a reservist is not to be unnecessarily penalized for the time that he must spend on military duty rather than at work. See *Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060, 1067 n.7 (S.D. Fla. 1978).[6] As the Fifth Circuit stated in *West* v. *Safeway Stores, Inc.*, *supra*, 609 F.2d at 149:

> The essence of reserve duty in this context is absence from work. If employers could * * * require that workers be present in order to receive certain benefits, then reservists could never secure the benefits or advantages of employment which the Act was designed to protect.

Under the interpretation of the court below, the protection afforded to reservists by 38 U.S.C. 2021(b)(3) "would be effectively annulled." 609 F.2d at 149. Particularly in light of the long-established rule that the reemployment rights provisions of the Act are "to be liberally construed for the benefit of those who

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[6] It is not disputed that respondent could have arranged its schedule so that petitioner could work 40 hours during the week he had reserve duty (see App. D, *infra*, 25a). The Act requires respondent to take reasonable steps to accommodate the reservist. If it is impossible to make such an accommodation, the Act does not require the reservist to be paid for hours he does not work. See *West* v. *Safeway Stores, Inc.*, 609 F.2d at 150 n. 8. Here, respondent made no effort to accommodate petitioner.

left private life to serve their country," *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), the court of appeals' decision should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

No. 78-3233

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

ROGER D. MONROE, PLAINTIFF-APPELLEE,

v.

THE STANDARD OIL COMPANY,
DEFENDANT-APPELLANT.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed January 24, 1980.

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal by the defendant-appellant, The Standard Oil Company (Sohio), from a summary judgment of the district court granting plaintiff-appellee recovery of wages for time spent attending military reserve meetings during his regularly scheduled work hours.[1] Recovery was predi-

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[1]The district court opinion is reported at 446 F. Supp. 616 (N.D. Ohio 1975).

cated on 38 U.S.C. § 2022 and § 2021(b)(3) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

The case was submitted to the trial judge by counsel for the parties on a stipulation of facts.

During the years 1975 and 1976, the years in which Sohio allegedly violated the Act, plaintiff-appellee, Roger D. Monroe was a full-time employee of Sohio at its Lima, Ohio, refinery. He was also a member of a unit of the Army Reserve and was required to train with his unit on the third weekend of each month and during the last two weeks of August each year.

Throughout the two years in question, Sohio operated its Lima refinery twenty-four hours per day, seven days per week. The work day was divided into three eight-hour shifts. Sohio rotated its employees' shifts. All employees were scheduled to work five eight-hour days in a row per week, but with a different five-day sequence each week. Under this system, weekend work was distributed equally among employees in the course of a year.

Appellant scheduled Monroe to work a full forty hours each week. Sohio periodically slated appellee to work Saturdays and/or Sundays just as it did Monroe's fellow employees. Except for normal time off and the absences for inactive military reserve training in issue here, plaintiff customarily worked his scheduled forty-hour weeks with occasional overtime.

Employment at the Lima refinery was governed by a collective bargaining agreement between appellant and the Ohio Chemical and Atomic Workers Interna-

tional Union during the pertinent period. Article V, ¶ 23 of that agreement provided:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

On four occasions during 1975 and 1976, Monroe was able to change shifts with his fellow employees to accommodate his reserve training and still work a forty-hour week. On twenty-four other days when he was required to train, however, appellee was unable to arrange for an exchange of shifts with other employees. As a result of his absence from the refinery on these days, appellee lost a total of 192 hours of work for which he was not compensated.

Sohio took no steps to provide Monroe with substituted hours or to make up for appellee's lost working time, other than as provided by Article V, ¶ 23 of the collective bargaining agreement. In this regard, Monroe was treated the same as all other Sohio employees under the agreement.

Monroe brought this action against Sohio pursuant to 38 U.S.C. § 2022, asserting that Sohio had violated §§2021(b)(3) and 2024(d) of the Act by refusing to rearrange his work schedule to allow him to work a full forty hours per week during those weeks when his military reserve obligation otherwise precluded him from working a full forty hours.

The cause was submitted on the parties' cross-motions for summary judgment. The district court deemed the issue to be whether plaintiff was denied "an incident or advantage of employment," 38 U.S.C. § 2021(b)(3), "when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would." The court determined *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975), *appeal dismissed*, No. 75-2324 (6th Cir. January 21, 1976), to be dispositive of the issue. Sustaining plaintiff's cross-motion for summary judgment, the district court held that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" and awarded plaintiff $1,086.72 for wages lost on those "workdates when an accommodation should have been made." This appeal followed.

Appellant contends that it is under no obligation to schedule plaintiff additional working hours or pay him for hours not worked. Sohio further claims that any obligation it owed Monroe was satisfied when it scheduled him to work forty hours per week and granted him the right to switch hours with other employees. We agree.

We begin by looking at two sections of the Act, both of which govern reemployment rights of reservists.

Title 38 U.S.C. § 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in

> the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

Originally enacted in 1960 as 50 U.S.C. § 459g(4), section 2024(d) extended, for the first time, the rights set forth therein to reservists "who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training periods. . . . S. Rep. No. 1672, 86th Cong., 2d Sess. 2, *reprinted in* (1960) U.S. Code Cong. & Ad. News 3077, 3078.

Section 2024(d) guarantees terms and conditions of reemployment to reservists returning from inactive duty training. It does not, however, protect reservists from discrimination by their employers between training assignments. In the years following the enactment of § 2024(d), discriminatory employment practices intensified. Congress responded by passing what is now 38 U.S.C. § 2021(b)(3)[2] to remedy this problem. Title 38 U.S.C. § 2021(b)(3) reads in pertinent part:

> Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces.

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[2] Formerly, 50 U.S.C. § 459(c)(3).

The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said:

> Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions . . . or discharged because of [their training obligations]. [Section 2021(b)(3)] is intended to protect members of the Reserve . . . from such practices. It provides that these reservists will be entitled to the *same treatment afforded their coworkers* not having such military obligations. . . . [emphasis added] S. Rep. No. 1477, 90th Cong., 2d Sess, *reprinted in* (1968) U.S. Code Cong. & Ad. News 3421, 3421.

Lott v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975), *appeal dismissed*, No. 75–2324 (6th Cir. January 21, 1976), relied on by the district court, was one of the first cases to interpret section 2021(b)(3). In *Lott*, the court held that the opportunity to work overtime hours qualifies as an incident or advantage of employment protected by section 2021(b)(3), and ruled that a reservist may not be charged for overtime hours that he is forced to refuse because of his military training obligations.

The union contract that controlled overtime scheduling in *Lott*, *supra*, provided that an employee could refuse offered overtime, but he would be "charged" as if he had worked the scheduled overtime, even if his nonacceptance was due to reasons beyond his control, such as sickness or personal business. The plaintiff in *Lott* missed overtime opportunities on two

occasions because of his required attendance at reserve meetings. He was charged for the overtime refused in accordance with the collective bargaining agreement. The *Lott* court rejected the employer's argument that since the contract was neutral on its face and was applied neutrally by the defendant, plaintiff was being treated equally with his co-workers as required by section 2021(b)(3). The court reasoned that to permit the application of the contract provision with equal force to all employees, including military reservists, "would permit a collective bargaining agreement to nullify the express protections of section [2021(b)(3)]." 395 F. Supp. at 869–870. Finding that the defendant's nonreservist employees were charged only if they "voluntarily" refused overtime, the district court held that the employer was required to accommodate the plaintiff by making missed overtime opportunities available to him.

Based on its reading of the *Lott*, *supra*, decision, the district court in the present case had "no trouble in holding that being scheduled for a full forty hour week . . . constitutes an incident or advantage of employment" and finding Sohio liable to the plaintiff "for those work dates when an accommodation should have been made." Explaining its holding, the court stated that section 2021(b)(3) "does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations. . . ." We disagree.

We do not dispute the district court's holding that plaintiff had a right to be scheduled to work forty

hours a week and that this right is an incident or advantage of employment within the meaning of section 2021(b)(3). We reject, however, the district court's conclusion that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded to their fellow employees.

As a starting point in our analysis, we note that we are required "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of a veteran as a harmonious interplay of the separate provisions permit." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Title 38 U.S.C. §§ 2024(d) and 2021(b)(3) are complementary and must be read together to understand the breadth of and limits to reemployment rights granted to reservists.

Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aiello* v. *Detroit Free Press, Inc.*, 570 F.2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.

Section 2021(b)(3), on the other hand, does not enumerate the incidents or advantages of employment that it safeguards. The protection afforded by this section is purely derivative. It is intentionally framed in general terms to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns. But, just as the property rights protected by the Due Process Clause of the Fourteenth Amendment can only be ascertained by looking outside the Amendment to state law, we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment.

In the case at bar, two incidents or advantages of employment were established: the right to be scheduled for a full forty-hour workweek and the right to exchange shifts with other employees if mutually agreeable to the employees involved and approved by the shift foreman. The record does not reveal whether the right to be scheduled for a forty-hour workweek was guaranteed by the collective bargaining agreement. The parties stipulated, however, that all employees, including the appellee, were customarily scheduled for that number of hours. We believe this to be sufficient to establish an employment practice as an incident or advantage of employment. The right to exchange shifts was provided for under the terms of the union contract then in effect. Unquestionably, the right qualifies for section 2021(b)(3) protection as well.

There was no unconditional right to work forty hours a week at defendant's refinery. The right to work forty hours was contingent upon the employees' presence and ability to perform at their regularly scheduled work periods, or, in the alternative, upon successfully arranging to change scheduled working time with other employees. Thus, unless the appellee was denied the right to be scheduled for forty hours a week or denied the right to exchange shifts "because of any obligation as a member of a reserve component of the Armed Forces," § 2021(b)(3), *supra*, no violation of section 2021(b)(3) occurred.

Section 2021(b)(3) provides that incidents or advantages of employment may not be "denied . . . because of any [military obligation]." This clause is subject to two interpretations in cases such as this. First, it can be read to mean that any time an employee's forced absence for reserve duty requires him to forgo a benefit that would have accrued to him only if he had been present for work, he has been "denied" an incident or advantage of employment "because of" his military obligation. This is the interpretation subscribed to by the court in the instant case and the court in *Lott* v. *Goodyear Aerospace Corp.*, *supra*, 395 F. Supp. 866. Under this view, employers have a duty to alter their employment rules, which may necessitate the fashioning of exclusive preferential rights, to accommodate reservist-employees' military training obligations. An employer must shoulder this burden even though the detriment to the reservist is a direct consequence of his military undertaking and not the result of intentional unequal treatment by his employer. We believe such an interpretation ignores the legislative history of

the Act and requires a tortured reading of section 2021(b)(3).

The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be "entitled to the same treatment afforded their coworkers not having such military obligations." S. Rep. No. 1477, *supra*, at 3421. We find no support in the legislative history of this section for the view that reservists are to receive preferential treatment; only that they must not be subjected to on-the-job bias by their employers because of their prospective military obligations.

In the absence of a clear and unambiguous statutory mandate to the contrary, we hold that section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations. To meet this requirement, collective bargaining agreements and employment rules must be facially neutral and must be applied uniformly and equally to all employees.

The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees.

The condition precedent to plaintiff's right to work forty hours, as opposed to being scheduled to work forty hours, was never satisfied. The right to work forty hours was contingent on appellee's being present for work or arranging to switch shifts. On twenty-four occasions, appellant was unable to do either. His inability to exchange shifts was not due to unequal treatment by the appellant but attributable to the lack of cooperation on the part of his fellow employees. Nor were Monroe's absences on these occasions the result of disparate employment practices designed to deny appellee the right to be present for work because of his status as a member of the military reserve. Monroe was absent because he had to attend reserve training. Appellant was required to grant appellee a leave of absence on these days, and it did. It was not required to do more. Thus, the right to work forty hours during the weeks in question did not vest. Since there was no right to work forty hours during these weeks, there was no incident or advantage of employment protected by § 2021(b)(3) that was "denied . . . because of any obligation as a member of a reserve component of the Armed Forces." Sec. 2021(b)(3), *supra*. *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980), involved a suit similar to the case at bar. There, the collective bargaining agreement guaranteed employers the right to work forty hours a week conditioned upon their presence at work. Interpreting § 2021(b)(3) to require that such agreements be construed as if an absent employee is "constructively present" on those days he has reserve training, the Fifth Circuit held that the employer was required to accommodate the plaintiff by rescheduling him during those weeks when

he was absent for reserve duty. We find nothing in the legislative history or the statute to support judicial invalidation of nondiscriminatory conditions precedent to employee benefits and adhere to our belief that conditional benefits are protected by § 2021(b)(3) only to the extent that the conditions have been actually satisfied.

We believe the result reached in *Carney* v. *Cummins Engine Co., Inc.*, 602 F.2d 763 (7th Cir. 1979), is consonate with the result here, though we choose not to adopt fully that court's rationale. In *Carney*, the Court of Appeals for the Seventh Circuit affirmed a district court judgment that a collective bargaining agreement suspending the right of reservists to be paid for accrued overtime when transferring departments was violative of section 2021 (b)(3), where other employees were not denied this benefit upon transfer. We agree with the court that the collective bargaining agreement was no defense in that instance, since the contract provision at issue clearly discriminated against reservists. We decline to adopt the courts further reason for affirmance, however, insofar as the court appears to hold that the right to overtime opportunities is conferred by statute rather than by employment contract or practices.

For the foregoing reasons, we reverse the judgment of the District Court and remand the case with instructions to dismiss the complaint.

APPENDIX B

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 78-3233

ROGER D. MONROE, PLAINTIFF-APPELLEE,

v.

THE STANDARD OIL COMPANY,
DEFENDANT-APPELLANT.

[Filed Jan. 24, 1980]

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss the complaint.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as

itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by order of the Court.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:
/s/ DOROTHY J. PHELAN
Deputy Clerk

Issued as Mandate: May 1, 1980

COSTS: None

Filing Fee ..... $ .....
Printing ..... $ .....
Total ..... $ .....

APPENDIX C

No. 78-3233

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

ROGER D. MONROE PLAINTIFF-APPELLEE

v.

THE STANDARD OIL COMPANY
DEFENDANT-APPELLANT

ORDER

[Filed Apr. 15, 1980]

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

Plaintiff-appellee's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit.

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court

APPENDIX D

In The United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 76-71

ROGER D. MONROE,

PLAINTIFF,

v.

THE STANDARD OIL COMPANY,

DEFENDANT.

OPINION AND ORDER

YOUNG, J:

This cause came to be heard upon the motion of defendant for summary judgment and upon cross-motion of plaintiff for summary judgment. This Court is presented with an issue of apparent near first impression regarding the relationship of a member of the Army Reserve to his civilian employer. The parties have aided the determination of this cause by stipulating a series of facts.

I. *FACTUAL BACKGROUND*

At all times herein, plaintiff is a member of a unit of the Army Reserve. Plaintiff is required to train with his unit one weekend per month, and must spend two weeks per year training, usually in the summer. Stipulation of Facts ¶ 22. In addition to his military service, plaintiff is a full time employee at the defendant's refinery in Lima, Ohio. Customarily, plaintiff works a full forty hour week except when he is absent from his civilian employment for personal reasons, vacation, sick leave, or military leave. Stipulation of Fact ¶¶ 3–5.

The refinery at Lima operates on a twenty-four hour per day schedule seven days per week. Each day is divided into three working shifts. Scheduling of employees is done in such a way that an employee such as plaintiff works various days of the week, although generally for five days in succession. On a given week, an employee might work Monday through Friday, while at other times he might work Tuesday through Saturday, Wednesday through Sunday, and so on. Thus, the impact of such a scheduling system is to give the employee forty hours of regularly scheduled work while at the same time requiring him to work certain weekends and correspondingly to take his days off during the week.

At all times herein, employment at the Lima refinery has been governed by a collective bargaining agreement between the defendant and the Oil, Chemical and Atomic Workers International Union. Stipulation of Facts 6. Article V, ¶ 23 of that agreement provides:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager. Stipulation of Fact ¶ 7.

It is further stipulated between the parties that plaintiff was treated no differently in terms of work scheduling than other employees. Stipulation of Fact ¶ 11. Plaintiff, thus, had the right to change shifts if he found another employee willing to change. Stipulation of Fact ¶ 11. In the event a particular employee is absent from his work assignment, defendant's practice is to bring in a replacement, and during 1975 and 1976, there were occasions when such extra employees were needed. Stipulation of Fact ¶¶ 20–21.

On four different occasions in 1975 and 1976, when plaintiff was scheduled to work at the same time as he was required to attend military reserve training, he was able to exchange shifts with other employees so that he retained a full forty hour work-week. Stipulation of Fact ¶ 12. On the following days, however, plaintiff was required to attend military reserve training and was not able to exchange shifts and for

that reason was absent from his assigned refinery position:

1975: May 10, 11
June 14, 15
August 1
September 6
October 3, 4
November 7
December 7

1976: January 9, 10, 11, 17, 18, 23, 24, 25
February 7, 8
March 6
June 6
July 17, 18

Stipulation of Fact #13. Thus, by missing 24 days of work over the two year period, plaintiff has missed a total of 192 hours of work for which he was not compensated. Stipulation of Fact ¶15. Plaintiff here is seeking damages from the defendant in the amount of wages which would have been earned on the missed days. Plaintiff's hourly wage rate for the time missed was $5.66. Stipulation of Fact ¶ 16.

Defendant's position is that it is not required to schedule the plaintiff for additional hours of work or to pay him for hours not worked. In other words, defendant claims that if it owed any obligation to plaintiff, that obligation was satisfied when the defendant scheduled plaintiff to work and when plaintiff was able to exchange shifts pursuant to the collective bargaining agreement.

II. *STATUTORY BACKGROUND*

Title 38, U.S.C. § 2021(b)(3)[1] provides:

> Any person who holds a position in Clause (A) or (B) of subsection (a) of this section (including a person in the employ of a private employer) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The defendant here is an employer within the meaning of the statute. The issue presented to the Court is whether plaintiff was denied an incident or advantage of employment when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would.

The legislative history of the statute was examined by the United States District Court for the Northern District of Ohio, Eastern Division, when it was called upon to decide a similar issue. *See, Lott* v. *Goodyear Aerospace Corporation*, 395 F. Supp. 866, 868 (N.D. Ohio 1975). The intent and purpose of the bill is "to prevent Reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership. . . ." S. Rep. No. 1477, 90th Cong., 2d Sess, at 1–2, U.S. Code, Cong. & Admin. News, p. 3421 (1968). The senate Report states:

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[1] What is now 38 U.S.C. § 2021(b)(3) was formerly 50 U.S.C. App. § 459(c)(3). The recodification took place on December 3, 1974, pursuant to P.L. 93-508.

> It (the bill) provides that these reservists will be entitled to the same treatment afforded their co-workers not having such military obligations by requiring that employees with Reserve obligations "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces of the United States." S. Rep. No. 1477, 90th Cong., 2d Sess. at 2, U.S. Code, Cong. & Admin. News, p. 3421 (1968).

Lott v. *Goodyear Aerospace Corporation*, *supra*, is one of the few authorities cited by the parties. In *Lott*, a reservist brought an action against his employer which sought to challenge the employer's practice of "marking up" an employee for overtime because the employee could not take advantage of the overtime due to military obligations. Although overtime was voluntary, the overtime scheduling system was designed in such a way that overtime would be equalized as nearly as possible between employees. 395 F. Supp. at 867. On several occasions military reserve obligations prevented plaintiff from working overtime as he had been scheduled. By "marking up" plaintiff for overtime, the company counted plaintiff as having worked those hours for scheduling purposes although he was not paid for them. 395 F. Supp. at 868. Further overtime apparently was scheduled for the plaintiff as if he had worked the originally scheduled overtime hours. The District Court in *Lott* held that the employer's practices violated the act.

Plaintiff has also directed this Court to the unreported case of *Hanning* v. *Kaiser Aluminum*, No.

76–547 (E.D. La. June 29, 1977). There, plaintiffs, in addition to belonging to a reserve Coast Guard unit, worked as welders for defendant. Plaintiffs were granted leaves of absence to attend the yearly two-week training period. The July 4th holiday fell during the two-week period and the company refused to pay each plaintiff for that holiday because neither had worked during the payroll week immediately prior to the holiday as required by the applicable collective bargaining agreement. The Court there held that the employees were entitled to the holiday pay and that the employees would be treated as if they had been at work during the week prior to the holiday.

Both *Lott* and *Hanning* represent at least slightly distinguishable situations from that presented in the instant action. In *Hanning*, the company was obligated by agreement to pay plaintiffs had they not been at reserve training. In *Lott*, the "marking up" of employees was at issue and not actual presence on the job. In the instant action, we are not concerned with holiday pay or "marking up" for overtime. Rather, we are concerned directly with the presence of the employee on the job, and in effect, the degree to which the employer must manipulate his work schedule to allow for the presence of his guardsmen-employees on the job. Thus it is clear that the distinctions are without difference so far as the basic issue in this case is concerned.

Normally, employees at the defendant's refinery work a forty hour week. Regardless of the particular days of the week or shifts which an employee works, employees can be sure that they will be scheduled for a

full forty hours. Moreover, employees such as plaintiff can expect to work various days of the week depending on the work schedule as outlined above. In light of *Lott's* holding that "marking up" for overtime benefits constitutes an incident or advantage of employment, it would follow that being scheduled to work a full forty hour week constitutes an incident or advantage of employment. Thus, this Court has no trouble here holding that being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment for the plaintiff, and finding that the defendant is liable to plaintiff for those work dates when an accommodation should have been made.

The defendant attempts to analogize the statute here involved with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the EEOC Guidelines promulgated pursuant to the statute requiring only that employers make "reasonable accommodation" to the needs of employees to be absent for religious purposes. Defendant contends that the case law developed under these provisions only requires the employer's practices to be neutral, and equally applicable to all employees.

This analogy fails, because the statute here in question forbids denying those in military service incidents or advantages of employment because of their obligations of service. This does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern

to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be treated no differently than those who do not accept this obligation.

Nor is the Court persuaded by the argument that since the statute has not been construed to require the employer to pay wages to employees during their absence for extended periods of military service, such as the annual two week reserve training period, it should not be required to pay for the one or two day absences its employment scheduling practices forced upon the plaintiff. The difference between the two situations is not merely quantitative, but is qualitative.

Much argument is devoted to the complexities and burdens that might arise if the defendant were required to alter its scheduling practice to avoid the losses those practices have inflicted upon the plaintiff. Basically, this is purely a money issue, which would be difficult, if not impossible, for the Court to determine, but very simple for the defendant to resolve. If it would cost the defendant more to change its scheduling practices than it would to pay the plaintiff for the time he annually loses because of these practices, the defendant can choose the less expensive alternative. Neither individuals nor corporations can expect to live in a free nation without making some cash payments for the privilege.

THEREFORE, for the reasons stated, good cause appearing therefor, it is

ORDERED that the cross-motion of plaintiff for summary judgment be, and it hereby is, sustained; and it is

FURTHER ORDERED that the motion of defendant for summary judgment be, and it hereby is, overruled; and it is

FURTHER ORDERED that the clerk enter judgment in favor of plaintiff against the defendant in the sum of One Thousand Eighty-Six Dollars and Seventy-Two Cents ($1,086.72) for wages lost as a result of his serving his military obligation.

It is so ordered.

/s/ DON J. YOUNG
United States District Judge

Toledo, Ohio.
February 21, 1978.

APPENDIX E

In the Supreme Court of the United States

No. A-4

ROGER D. MONROE,

PETITIONER,

v.

STANDARD OIL COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 28, 1980.

/s/ POTTER STEWART
Associate Justice of
The Supreme Court of the United States

Dated this 8th day of July, 1980.